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Supreme Court, U.S.
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No. 91-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JESSE TURNER, et al. APPELLANTS,

v.

THE STATE OF ARKANSAS, et al. APPELLEES

On Appeal from the United States District Court
for the Eastern District of Arkansas
Western Division

MOTION TO AFFIRM

Respectfully submitted,

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MOTION TO AFFIRM

Appellees move pursuant to Sup. Ct. Rule 18.6 to affirm the judgment below on the ground that the questions presented in the Jurisdictional Statement are so insubstantial on this record as not to require further argument.

STATEMENT OF THE CASE

Appellants are black residents of Arkansas, and their complaint challenged the redrawing of Arkansas' congressional district lines by the state legislature following the 1990 decennial census. Appellees are the State; the Governor; the

Secretary of State in his capacities as a state election official; the Speaker of the House and the President Pro Tempore of the Senate. In the District Court, appellants asserted that the redistricting plan passed by the legislature and signed into law by Governor Clinton (Act 1220) violated section 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. For their Voting Rights Act claim appellants contended that the legislature should have adopted a plan supported by the small Republican delegation (the Arkansas General Assembly is overwhelmingly Democratic) which packed most of the state's black voters into a single congressional district (out of the state's four) which split several counties, townships, cities and precincts and which contained about 38% black voting age population. The Act 1220 plan kept counties intact and generally followed the contours of the existing plan, which had been adopted by the District Court in *Doulin v. White*, 535 F. Supp. 450 (E.D. Ark. 1982). Appellants' Equal Protection claim asserted that the legislature and Governor Clinton intentionally diluted black voting strength by failing to adopt the Republican-backed plan instead of Act 1220.

Appellants filed their complaint on May 17, 1991. Appellees moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On November 15, 1991, the three-judge District Court unanimously granted appellees' motion for summary judgment on both the statutory and constitutional claims.

REASONS FOR SUMMARY AFFIRMANCE

The question presented to the District Court on appellees' motion to dismiss or for summary judgment was whether there exists under the Voting Rights Act a cause of action for influence districts and, if so, whether the complaint stated such a claim which could withstand a motion for summary judgment. Drawing upon a body of case law which invariably has held that claims like the appellants. cannot be brought under the Voting Rights Act, the court unanimously granted

appellees' motion for summary judgment. The District Court's unanimous decision here was firmly based on fundamental and firmly established legal principles in voting rights jurisprudence. Summary affirmance is thus appropriate in this case as the arguments presented by appellants are insubstantial and need no further argument.

A. THE INFLUENCE CLAIM

Appellants characterize their Voting Rights Act claim as an "influence" claim. Nothing in the Act or the voluminous body of case law developed under the act supports such a claim, though. By its plain language, Section 2 supports only claims that members of a protected class "have less opportunity to participate in the political process and to elect representatives of their choice." (emphasis added). This Court established a threshold test to determine the viability of section 2 claims in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Thornburg*, this Court held that, in order to sustain a Section 2 claim, a minority group must, inter alia, "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district ... If it is unable to satisfy this precondition, a minority group cannot sustain its claim that the ... voting scheme operates to impair minority voters' ability to elect representatives of their choice."[1] 478 U.S. at 50. The Court also noted that "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 451, n. 17.[2]

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[1]The *Thornburg* test also requires a showing that the minority is politically cohesive, and that whites vote as a bloc usually to defeat the minorities' preferred candidate. Id.

[2]The *Thornburg* decision did not specifically address the issue of influence districts or the application of the threshold test to single member districts because those issues were not before the court. 478 U.S. at 46, n. 12. However, as discussed more fully infra, the Thornburg threshold test logically could be, should be, and has been extended to cover both types of claims.

The basic foundation for the bright line test established in *Thornburg* is the statute itself. As previously noted, Section 2 contemplates only those claims which allege an inability by minorities to elect candidates of their choice.

> In recognizing that some senate report factors are more important to multimember vote deletion claims than others, the Court effectuates the intent of congress. It is obvious that unless minority group members experience a substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect". §2(b) .... Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and the racial bloc voting, the Court simply requires that Section 2 plaintiffs prove their claim before they may be awarded relief.

478 U.S. at 48, n. 15.

The *Thornburg* court clearly held that Congress intended to protect minorities from districting schemes which dilute their ability to elect. As the Seventh Circuit has noted in rejecting an influence claim, the distinction between "influence" claims and those alleging inability to elect "seems inconsistent with the statute's language.... The essential inquiry is whether the political processes are equally open to participation by minority voters. It calls for one only claim."

McNeil v. Springfield Park District, 851 F.2d at 937 (7th Cir. 1988). To create a new cause of action for "influence" claims under Section 2 "would invite courts to build castles in the air, based on quite speculative foundations." Id. at 944. Appellants here ask the court to speculate that the plan they propose might help a black candidate get elected. To move away from the firm underpinnings of the *Thornburg* standard to the murky waters and shifting sands of appellants' position, though, defies both the statute and common sense.

In *Brewer v. Hamm*, 876 F.2d 448 (5th Cir. 1988), the plaintiffs challenged a multimember district even though plaintiffs could not demonstrate that they could draw a majority minority single member district. The court followed the Seventh Circuit in rejecting plaintiffs' influence claim, holding that:

> Courts must...measure the alleged discriminatory election system against an ideal electoral system which does not contain the challenged structure. See. *Thornburg*, 478 U.S. at 88 (O'Conner, J., concurring). If the minority group is disbursed throughout the electoral district or is so small in proportion to the electorate as a whole, such that even under a single-member district plan the minority is not assured the power to elect representatives of its choice, the at-large feature of the election system, by itself, cannot be said to violate Section 2... 478 U.S. at 50, n.17.

Id. at 455. To do otherwise the Court noted, would be to engage in sheer speculation about the outcome of whatever remedy could be imposed. "Courts do not adjudicate with crystal balls." Id.

In the instant case, appellants may prevail only if there is a cause of action under Section 2 for an "influence" claim. The lower courts which have considered the issue have correctly decided that there is no such cause of action. *McNeil, supra*;

Brewer, supra. Having failed to allege a necessary precondition to their lawsuit — that a majority black district could have been created — the District Court correctly ruled that appellants could not sustain their Section 2 claim. *Accord, see, Romero v. City of Pomona*, 665 F. Supp. 853 (C.D. Cal. 1987); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987); *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739 (D.L. Mass 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).

Even the courts that have distinguished *Gingles* on the electoral majority requirement have adhered to the basic rationale behind the threshold test and required plaintiffs to prove the existence of both polarized voting that diminishes minority electoral success and a remedy (the ability to elect candidates of their choice in a single-member district) in order to make out a claim. In *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), plaintiffs alleged and offered proof that the single-member districting scheme in effect there split the black community in Youngstown between two districts with about 11% and 25% black population, and that that districting arrangement resulted in black voters being unable to elect candidates of their choice because of white bloc voting. Plaintiffs further alleged and offered proof that a single-member district could be drawn in Youngstown which would contain about 34% black population from which the minority "will be able to elect a candidate of their choosing." 775 F.2d at 1059.

Likewise, in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), and *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 926 F.2d 487 (5th Cir. 1991), the courts found a section 2 violation only after establishing the failure of the minority to elect its preferred candidates, and that the minority would be able to elect in a single-member district.[3]

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[3]Any "distinction" from Gingles in these cases in pure dicta, because in each case the first threshold standard was met. *Garza*, 918 F.2d at 769; *East Jefferson*, 926 F.2d at 491.

In all the cases which supposedly distinguish Gingles, the central elements of the threshold standards have been uniformly applied. The District Court here also applied the essence of the threshold standard by requiring appellants to allege and prove that minorities cannot overcome white bloc voting to elect candidates of their choice in the existing districts and that they could elect their candidates in the proposed districts. Appellants did not make such allegations because they could not prove them, and the District Court ruled accordingly.

If an influence claim can be brought under Section 2, surely it must be a minimum pleading requirement that the challenged plan dilutes black voting strength in some manner so that black influence is diminished. Here, appellants did not allege that black voters lack influence in congressional elections in the existing plan. They didn't even allege that minorities fail to elect representatives of their choice under the existing plan. If there is a cause of action for "influence" districts in Section 2, there also has to be some workable standard for determining such a claim. The *Thornburg* standard would surely be the model, requiring section 2 plaintiffs to allege and prove that there is some concrete remedy for identifiable vote dilution. See, *Brewer, supra*. The lower court correctly held that appellants have not made sufficient allegations in their complaint, or offered sufficient proof to meet any kind of standard the court may reasonably develop.

B. FOURTEENTH AND FIFTEENTH AMENDMENT CLAIM

Appellants allege that the General Assembly and Governor Clinton purposefully diluted black voting strength by enacting and signing into law the *Doulin*/Act 1220 plan. They assert that since the "legislature took no affirmative action to ensure that a congressional district was created with a maximum percentage of black residents" (paragraph 28(f) of plaintiffs' complaint), and since the General Assembly didn't wait to effect redistricting until "guidance could be obtained from the

Justice Department" (paragraph 28(g) of plaintiffs' complaint), App. A., 90, then the plan violates the Fourteenth and Fifteenth Amendments because it is purposefully discriminatory.

There is no allegation in the complaint, though, and appellants offered no proof in response to the motion for summary judgment, that the *Doulin*/Act 1220 plan resulted in black voters being unable to elect congressmen of their choice, or even that black voters failed to influence congressional elections under that plan. The essential element of a constitutional vote dilution claim is that the minority plaintiffs have "less opportunity than ... other residents in the district to participate in the political processes and to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973), *citing Whitcomb v. Chavis*, 403 U.S. 124, 149-150 (1971). *See, also, Davis v. Bandemer*, 478 U.S. 109, 136 (1986). The allegations in the instant complaint cannot be construed to assert that black voters have failed to elect congressmen of their choice — they merely assert that the Generally Assembly did not draw districts the way appellants wanted them. Appellants lost a political battle. Since did not allege (and could not prove, if they did) the essential element of a constitutional vote dilution claim, they cannot prevail.

Appellants brought this claim under 42 U.S.C. §1983, which requires as a threshold matter that plaintiffs allege and prove that defendants' conduct deprived plaintiffs of "rights, privileges, or immunities secured by the constitution or laws of the United States." See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Baker v. McCollan*, 443 U.S. 137, 140 (1979). By not asserting a failure to elect congressmen or influence congressional elections, they did not plead this threshold showing sufficiently to state a claim.

Even if the complaint had met the threshold requirements, the lower court correctly found that the undisputed facts in the record entitled appellees to summary judgment as a matter of law.

The acts of State officials are presumed to be

constitutional. *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985, *cert. denied*, 478 U.S. 1021; citing *Borden's Farm Products v. Baldwin*, 293 U.S. 194 (1934)). Courts should be "reluctant to attribute unconstitutional motives to the state, particularly where a plausible [constitutional] purpose may be discovered from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394 (1983); quoted in *Butts, supra. See, also, Whitfield v. Democratic Party of the State of Arkansas*, 686 F. Supp. 1365, 1372-73 (E.D. Ark. 1988). It is not enough for a plaintiff to prove that the group allegedly discriminated against has not elected representatives in proportion to its numbers or that other factors influence the group's lack of success in elections. *Mobile v. Bolden*, 445 U.S. at 58-60 (1980); *Rogers v. Lodge*, 458 U.S. 620 (1982). Plaintiffs must prove that the 1981 plan was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination." *Mobile v. Bolden*, 446 U.S. at 58, quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971). The Supreme Court in *Bolden* and *Lodge* made it clear that the requirement of a showing of purposeful discrimination in voting cases is the same in other types of equal protection cases, citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976). Even if there were disproportionate impact here, where the character of a law is readily explainable on grounds apart from race, as would nearly always be the case where, as here, an entire system of electing legislators is brought in question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. *Mobile v. Bolden*, 446 U.S. at 70, citing *Washington v. Davis, supra*. Nor will reference to other objective factors, such as those relating to Section 2 claims (senate report factors) be sufficient to show purposeful discrimination. *Mobile v. Bolden*, 446 U.S. at 62-63; *Rogers v. Lodge*, 458 U.S. at 620. Proof of intent, direct or circumstantial, is an absolute requirement to finding a constitutional violation in this case. In order to prevail on their constitutional claim, appellees simply had to show that the General Assembly and Governor Clinton intended to dilute black voting strength.

Here, the General Assembly rejected a plan that would

have segregated the majority of Arkansas' black voters into a single district, leaving the other three with just 6.2 percent (First), 13.5 percent (Second) and 1.7 percent (Third) black population. The Act 1220 plan followed closely the plan that the District Court imposed in *Doulin v. White,* 535 F. Supp. 450 (E.D. Ark. 1982). If the Act 1220 plan was racially discriminatory, then so was the *Doulin* plan. Of course, the District Court did not impose a racially discriminatory plan in *Doulin*, and the General Assembly was entitled to rely on its legality. See *PUSH v. Mabus*, 932 F.2d 408-409 (5th Cir. 1991). Furthermore, the mere fact that there were legislative proposals before the General Assembly that appellants considered more favorable, and that the General Assembly declined to enact them, is not a sufficient showing of intentional discrimination. Id. Just because the legislature declined to pack most of the state's black voters into a single district, making the remaining three districts more fertile ground for the political minority's future aspirations, does not mean that the legislature meant to "fracture" the black vote. Rather, the state merely adhered to the general contours of the plan established by the District Court in *Doulin*, and the lower court here correctly found a total lack of discriminatory intent.

CONCLUSION

For the reasons stated in the District Court's opinion of November 15, 1991, and for the reasons stated herein, the District Court should be affirmed summarily.

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